

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, RUBEN MORA, BOBBY) CASE NO. 04 CV 3316
IRIZARRY, LEWIS CHEWNING, GILBERTO) (PAC) (AJP)

SANTIAGO, WILLIAM HELWIG, ROBERT)

MISURACA, JOSEPH CREMA, MARIO)

DIPRETA, VICTOR PHELPS, JOSELITO)

AROCHO, ALFRED CROKER, DANIEL)

SALEGNA, FRANK DELEON, and ROBERT)

PASTORINO, on behalf of themselves and all)

others similarly situated,)

Plaintiffs,)

Vs.)

EXPERT REPORT OF

MARK BERKMAN, Ph.D.

GRISTEDE'S OPERATING CORP., NAMDOR,)

INC., GRISTEDE'S FOODS, INC.; CITY)

PRODUCE OPERATING CORP.; GRISTEDE'S)

FOODS NY, INC., JAMES MONOS, and GALO)

BALSECA,)

Defendants.)

QUALIFICATIONS

1. I am a vice president of CRA International (CRA), an economic and management consulting firm. Prior to joining CRA in 2002, I was a vice president of NERA Consulting from 1991 to 2002. From 1983 through 1991, I held progressively more senior positions at NERA. Prior to joining NERA in 1983, I was a research fellow at the University of Pennsylvania from 1980 to 1983 and a budget and policy analyst at the Congressional Budget Office from 1977 to 1980. I earned a bachelors degree in urban affairs and economics from George Washington University, a master's degree in planning and policy analysis from Harvard University, and a PhD in public policy from the Graduate Group in applied economics and management at the University of Pennsylvania's Wharton School. My resume is attached as Appendix A to this report.

2. During the course of my career, I have conducted numerous labor studies involving the analysis of large databases. I have, for example, conducted or co-conducted seven disparity studies for local and county governments regarding statistical evidence of discrimination in contracting. I have also studied discrimination claims regarding pay, promotion, and termination for a variety of clients including several corporations, government agencies, and the NAACP. I have testified regarding my findings before both state and federal courts.

3. Several CRA staff members including Benjamin Risk and Jonathan Terhorst assisted me in conducting my analysis. Dr. Daniel Hamermesh, a professor of economics at the University of Texas and a CRA senior consultant, also provided assistance. CRA charges \$490 per hour for my services. CRA staff members, working under my direct supervision, are billed at their normal and customary rates, ranging from \$100 to \$180 per hour.

PURPOSE AND SUMMARY OF CONCLUSIONS

4. I have been asked by the respective counsel for all the defendants named in this proceeding to review data from Gristede's time management system, referred to as Novatime, and Gristede's payroll system, referred to as ABRA, with respect to claims made by the named plaintiffs who seek certification as class representatives regarding alleged violations of the Fair

1 Labor Standards Act and New York State law by Gristede's and the other defendants. In
2 response to this request I have:

- 3 a. Studied Gristede's time management and payroll processes that lead to the
4 creation of the data maintained in Gristede's Novatime and ABRA systems.
- 5 b. Examined whether, as alleged, edits to Gristede's timesheets and payroll
6 records have resulted in reduced hours and reduced pay for the regular
7 working week to the named plaintiffs and other Gristede's employees in co-
8 manager and department manager positions.
- 9 c. Examined whether, as alleged, Gristede's management has edited time sheets
10 in order to reduce pay for additional hours for co-managers and department
11 managers.¹
- 12 d. Examined whether, as alleged, there is evidence from Gristede's time
13 management and payroll data that the plaintiff co-managers and other co-
14 managers were frequently paid for less than 50 hours per week and that
15 plaintiff department managers and other department managers were frequently
16 paid for less than 40 hours per week.
- 17 e. Examined whether, as alleged, the named plaintiffs are similarly situated with
18 other Gristede's employees with the same job titles.
- 19 f. Examined whether, as alleged, there is evidence that the named plaintiffs and
20 other employees who have the same respective job titles have experienced
21 common treatment with respect to timesheet/payroll edits and compensation.
- 22 g. Critically reviewed the methodology and conclusions in the report filed on
23 behalf of plaintiffs by Dr. Stephen A. Schneider.

24 5. In brief, I have concluded that:

¹ Throughout this report, I use "additional hours" to mean hours beyond the 40 hours that occur in a normal workweek for department managers, or 50 hours in the case of co-managers.

- 1 a. There is no empirical evidence that management edited the plaintiff co-
2 managers and department managers in a manner that resulted in reduced hours
3 and compensation. Indeed, the data shows that the named plaintiffs benefited
4 from edits to their time sheets. Editing resulted in a net gains for individual
5 employees that ranged from 1% to 4,016% in total credited hours over what
6 the plaintiffs would have received had management performed no editing.
7 This is also true for the other co managers and department managers who are
8 not named as plaintiffs .
- 9 b. There is no evidence that the plaintiff department managers' time sheets were
10 edited in order to reduce pay for additional hours. Reductions in additional
11 hours are associated with corrections for missed punches. This also is true for
12 the other department managers who are not named as plaintiffs..
- 13 c. There is no empirical evidence that Gristede's co-managers and department
14 managers have been systematically paid for less than 50 hours or 40 hours per
15 week, respectively. To the contrary, there are more instances where the
16 plaintiff co-managers and department managers were paid for in more than 50
17 or 40 hours per week. This also is the case for the other co-managers and
18 department managers.. Twenty percent of co-manager paychecks were for less
19 than 50 hours while 26% were for greater than 50 hours. Six percent of
20 department manager paychecks were for less than 40 hours while 18% were
21 for greater than 40 hours.
- 22 d. The named plaintiffs do not appear to be similarly situated with other co-
23 managers and department managers For example, 4 of the 8 named plaintiff
24 co-managers worked at Gristede's for less than 1 year; another worked for just
25 over 1 year. In contrast, 60 percent of Gristede's co-managers have been with
26 company for more than one year, and 15 percent have been there for 5 years
27 or more. All, but two of the plaintiffs are former employees. In addition, co-

1 managers are not unionized, but department managers are. Consequently, they
2 are not similarly situated.

3 e. Variation in the frequency of edits, the reason for edits and the consequence of
4 edits varies considerably among the named plaintiffs as well as among all
5 other co-managers and department managers. Each employee's records would
6 have to be examined to determine whether any observed edits or failures to
7 pay a full 50 or 40 hour week was unwarranted.

8 f. Dr. Schneider's analyses on behalf of plaintiffs regarding edits, additional
9 time, and full work-week pay are seriously flawed and, when corrected,
10 contradict his conclusions. In addition, he does not consider whether the
11 named plaintiffs are similarly situated to the purported class, nor does he
12 consider whether the plaintiffs or purported class members share common
13 impacts from Gristede's alleged practices. By his own admission, he simply
14 "tabulated figures at plaintiff counsel's request."²

15 **DOCUMENTS RELIED ON**

16 6. In the course of my analyses I have considered various documents including:

- 17 a. Third Amended Class Action Complaint;
- 18 b. Plaintiff's Memorandum of Law in Support Of Motion for Class Certification
19 and Collective Action Notice;
- 20 c. Depositions of fact witnesses;
- 21 d. Report of Stephen Schneider on behalf of plaintiffs;
- 22 e. Deposition of Stephen Schneider;
- 23 f. Declarations of several named plaintiffs.

² Deposition of Steven Schneider.

1 7. In addition, I have analyzed Novatime and ABRA data provided to me by counsel to
2 Gristede's, Thomas Mawn of Automated Time Concepts, Inc., and by Dr. Schneider through
3 discovery.

4 **BACKGROUND**

5 8. The named plaintiffs include one current and seven former Gristede's co-managers and
6 one current and five former Gristede's department managers.³

7 9. A report prepared by Dr. Steven Schneider at the request of plaintiff's counsel has been
8 offered in support of plaintiff's claims. He concluded that co-managers received "a significant
9 number of weekly paychecks for less than 50 compensable hours." Similarly, he concluded that
10 department managers received "a significant number of paychecks for less than 40 compensable
11 hours." He also concluded that edits to department managers' time sheets by Gristede's
12 management resulted in "significant" losses in compensable hours and additional hours. In
13 addition, he concluded that all of these practices were widespread across employees, stores and
14 work weeks.

15 10. As a first step in analyzing the Gristede's time management and payroll data, I
16 investigated how these data were assembled. I found that the Novatime system captures
17 employee time card punches at every store. Each employee is required to punch four times a
18 day: at the beginning and end of his or her shift and at the beginning and end of his or her lunch
19 hour. The Novatime data is reviewed by store managers for accuracy. If a worker misses any
20 one of these punches, Novatime will credit a number of hours that is different from the number
21 of hours he or she actually worked. Accordingly, store managers can make manual corrections
22 to Novatime punch data. These credited hours are exported to the ABRA payroll system.

³ The named co-managers are: Lewis A. Chewning, Alfred L. Crocker, Frank DeLeon, William F. Helwig, Bobby Irizarry, Ruben D. Mora, Gilberto Santiago, and Carlos A. Torres. The named department managers are: Joseph Crema, Mario Dipreta, Robert Misuraca, Robert Pastorino, Victor Phelps, and Daniel J. Salegna.

PLAINTIFFS' CLAIMS ARE NOT SUPPORTED BY EMPIRICAL EVIDENCE**Impact of Management Edits**

11. Plaintiff's allegation regarding the negative impact of management edits to timesheets and payroll on department manager compensation are not clearly supported by the empirical evidence. To investigate this claim, I compared the overall hours credited to each employee with the number of hours they would have been paid for if no editing had taken place. My findings run contrary to those of Dr. Schneider: I found that editing took place to correct for missing punches, and that employees gained on balance from the edits.

12. As shown in Table 1, all of the named plaintiffs frequently failed to punch in or out. Robert Pastorino, for example, punched in completely (four punches: at the beginning and end of the shift and in and out for lunch) only once during the 440 days reviewed. Mario Dipreta punched in completely only twice in 285 days reviewed. Missing punches requires Gristede's management to edit department manager time sheets. Failing to punch at lunch for example, will show up in the Novatime system as an extra hour worked. Consequently, Gristede's store managers may find it necessary to edit timesheets to correct for this. Gristede's store managers may also find it necessary to edit timesheets to increase hours. If a department manager fails to punch out at the end of his or her shift – an action that as shown in Table 1 occurs with some frequency given the days of no punches and less than four punches – then the Novatime system fails to record that day's hours. An edit is necessary to credit the department manager for the day. Table 2A presents the number of days with positive or negative edits for the named plaintiff department managers specifically and the other department managers in aggregate. This table shows that both positive and negative edits are frequent – not surprising in view of the number of missed punches shown in Table 1. Table 2B shows the frequency of positive and negative edits by week. I also examined how many of the edits coincided with missed punches and found that edits to daily hours coincided with missed punches in the great majority of instances. Edits

1 coincides with missed punches 99% of the time for co-managers and 91% of the time for
2 department managers.⁴

3 13. Table 3 presents the consequences of these edits measured by the net number of hours
4 added or subtracted from the plaintiff department managers over the entire period for which we
5 have data.⁵ Table 3 clearly shows that edits to the named department manager plaintiffs' time
6 sheets have resulted in more hours than would have been the case without edits. Edits have
7 resulted in from a one percent to a 26 percent increase over originally punched hours. The same
8 is true for all other department managers. Edits to this group have resulted in a 12 percent
9 increase in hours.

10 **Editing of Additional Hours**

11 14. With respect to the claim that additional hours were frequently edited down, it appears
12 that this occurred because of missed lunch punches. I investigated the relationship between edits
13 to additional hours and missed lunch punches using econometric techniques. First, I defined a
14 missed lunch punch when a worker punches only twice in a day and Novatime calculates greater
15 than 7.5 hours between these two punches. Thus, a missed lunch constitutes two missed punches
16 during a shift. I calculated the additional hours that would have been credited had no edits been
17 made as the number of hours worked above 40 according to the unedited punch data, excluding
18 Sundays.⁶ I restricted my analysis to weeks in which editing resulted in a net reduction in
19 additional hours. I found that there was a statistically significant one to one correspondence
20 between the missed lunch punches and the reduction in additional hours.⁷

⁴ The correlation is not perfect for a few reasons. In some instances, an employee may miss multiple lunch punches in a week, but the manager will edit the employee's hours for just a single day. Alternatively, a manager may edit an employee's hours on a day with four punches because the manager observed improper punching, such as the worker punching in but not beginning work until half an hour later.

⁵ Novatime data covers the period February 2000 through April 2005.

⁶ Unless otherwise noted, throughout my analysis I have excluded data on punches and compensation on Sundays, since they are not considered part of the normal workweek by Gristede's.

⁷ I used a commonly apply econometric technique referred to as a probit model to test whether there was a statistically significant relationship between missed lunch punches and reduced additional hours. The probit model measures the likelihood of the reduction in hours as a function of missed lunch punches. The model indicated that

Paychecks for Less Than a Full Workweek

15. With respect to the claim that department and co-managers received a significant number of weekly paychecks for less than 40 or 50 hours, respectively, these occurrences were negligible in terms of total hours worked. I examined paychecks for co-managers and department managers from June 1999 to April 2005. I eliminated paychecks that covered pay periods within two weeks of a hire date and paychecks that covered pay periods in which a worker was terminated. I also eliminated employees who worked at Gristede's for four weeks or fewer.

16. As shown in Table 4, for three of the seven named co-managers, the number of weeks for which they were paid for less than 50 hours represents 3 percent or fewer of the weeks they have worked at Gristedes.⁸ One of these plaintiffs – William F. Helwig – was never paid for less than 50 hours. Two of the remaining four worked at Gristedes for 10 weeks or less. A closer look at the data reveals that many of the instances where the named co-managers were paid for less than 50 hours were in 10 hour increments. Approximately 24 percent of the weeks paid for less than a full week are for multiples of a work day. The data also show that co-managers were often paid for more than a full week. For example, Gilberto Santiago was paid for less than 50 hours in 8 of 233 weeks, but he was also paid for more than 50 hours in 27 of 233 weeks. Frank Deleon was paid for less than 50 hours in 9 of 103 weeks reviewed, but he was also paid for more than 50 hours. Thus, I see no systematic effort by management to pay the named co-managers for less than 50 hours. In order to establish the reasons for any full day pay reductions, the specific circumstances would have to be reviewed.

17. Among all co-managers other than the named plaintiffs, the number of weeks where one or more manager was paid for less than 50 hours represents about 20 percent of all co-manager weeks reviewed. At the same time, the number of weeks that these managers were paid for more

the relationship is one to one at the 95 percent confidence level. For a description of the probit model see for example, R. Pindyck and D. Rubinfeld, *Econometric Models and Economic Forecasts*, Second Edition, McGraw Hill.

⁸ The eighth co-manager Lewis Chewning worked for only 19 days. There are no electronic payroll data for him.

1 than a fifty hour week represents 26 percent of all co-manager weeks. Evaluating the basis for
2 these payments in both directions would require a case-by-case review.

3 18. For each department manager workweek with a paycheck for less than 40 hours, I
4 calculated hypothetical lost hours by summing difference between 40 hours and compensated
5 hours for each paycheck that had less than 40 compensated hours recorded. Had all paychecks
6 for less than 40 hours been increased to exactly 40 hours, excluding paychecks that were below
7 40 hours by a multiple of a full work day, I found that department managers would have received
8 a total of 6,145 additional compensated hours—roughly 0.5% of the total 1.3 million hours
9 worked during the period in question. Similarly, I found that co-managers would have received
10 an additional 16,695 compensated hours had their paychecks for less than 50 hours been
11 increased to 50 hours, again excluding paychecks that were below 50 hours by a multiple of a
12 full workday. Compared with the 680,000 hours worked during the period in question, this
13 represents roughly two percent.⁹

14 19. Table 4 also provides information regarding the named department managers. As shown,
15 the number of weeks where these managers were paid for less than 40 hours represents a small
16 share of total weeks worked. With the exception of Robert Misuraca and Daniel Salegna, all of
17 the named department managers were paid for less than 40 hours per week in only 3 percent of
18 the work weeks or less. These named department managers were also paid in excess of 40 hours
19 more often than they were paid for less than 40 hours. Although Mr. Misuraca was paid for less
20 than 40 hours in 12 percent of the work weeks, he was also paid for more than 40 hours 11
21 percent of the work weeks. Mr. Salegna was paid for less than 40 hours in 6 percent of the time,
22 but for over 40 hours 53 percent of the time. Similar to co-managers, in a substantial share of the
23 weeks where these department managers were paid for less than 40 hours, a full day's pay was
24 eliminated, which suggests that either a day without pay was taken or a worker's pay was

⁹ By calculating compensated hours that would have occurred but for edits made by Gristede's management, I am merely demonstrating that the quantities involved are minimal in nature. I am not concluding that these employees are owed additional compensation by Gristede's. Because there are many explanations for why an employee could have been compensated for less than a full workweek, a case-by-case review would be required to accurately calculate total correct hours for each member of the class.

1 reduced in an amount for an entire day. Evaluating the basis for these reductions requires case
2 specific review.

3 20. Among the other department managers, pay for less than 40 hours occurred on average 6
4 percent of the time. In contrast, pay for more than 40 hours occurred 18 percent of the time.
5 Again, in a large fraction of the instances where compensation was for less than 40 hours, the
6 reduction was a full day's pay, suggesting either an unpaid day or that a full day's pay was
7 reduced. Evaluating the basis for these requires a case specific inquiry.

8 **THE ALLEGED PRACTICES OF GRISTEDE'S AND THE OTHER DEFENDANTS DO NOT HAVE A**
9 **COMMON IMPACT ON THE NAMED PLAINTIFFS OR ON OTHER CO-MANAGERS AND**
10 **DEPARTMENT MANAGERS**

11 21. There is considerable variation in the time punch practices of individual employees and
12 variation in the way managers can elect to edit for missed punches. Moreover, there is no means
13 to evaluate statistically validate the basis for all edits. As a result, employees timesheet punches
14 and edits must be reviewed on a case by case basis.

15 22. As discussed above, there is no systematic explanation for the observed instances of
16 compensation for less than 40 or 50 hours. Evaluating these instances requires a case-by-case
17 review. While employees may be compensated for less than a full week in some instances, they
18 may also be compensated for more than a full week in other instances. The frequency of
19 paychecks for greater than a full week occurs more often than for less than a full week (See
20 Table 4). There is simply no common impact of Gristede's practices on either co-managers or
21 department managers.

22 **CRITICAL REVIEW OF THE REPORT OF STEPHEN SCHNEIDER**

23 23. Dr. Schneider, at the request of plaintiff's counsel, measured the frequency and scope of
24 co-manager paychecks for less than 50 compensable hours and department manager paychecks
25 for less than 40 compensable hours and Gristede's changes to time records that under
26 compensate department managers. As noted in paragraph 9, he concluded that co-managers
27 received a "significant number of paychecks for less than 50 compensable hours" and that

1 “department managers received a significant number of paychecks for less than 40 compensable
2 hours.” He also concluded that edits to department managers’ time sheets by Gristede’s
3 management resulted in “significant” losses in compensable hours and additional hours. In
4 addition, he concluded that all of these practices were widespread across employees, stores and
5 work weeks.

6 24. Dr. Schneider did not, however, conduct any analyses of Gristede’s data to study
7 whether his observations indicated that Gristede’s was improperly editing timesheets or paying
8 employees for less than they actually worked. As he admitted in deposition, he simply compiled
9 data at the request of plaintiff’s counsel.

10 25. Although Dr. Schneider notes in a footnote at the beginning of his report that his use of
11 the word significant does not mean significant on a statistical basis, by failing to repeat this
12 qualification when he states his conclusions his report leaves the impression that each of his
13 conclusions are statistically significant when in fact he never performed the necessary statistical
14 testing.

15 26. By failing to carefully analyze the data, Dr. Schneider’s report leaves the false impression
16 that Gristede’s management has purposefully reduced co-manager and department manager pay.

17 **The Empirical Evidence Does Not Support Dr. Schneider’s Conclusion That Management Edits**
18 **Resulted in Widespread Lost Hours**

19 27. Dr. Schneider’s conclusion regarding the impact of management edits is in error because
20 he failed to account for all relevant edits. For example, in the event of a missed in- or out-punch,
21 Novatime does not credit the employee for any time worked for the day. Gristede’s management
22 responds by adding one or more full workdays worth of time manually to the employee’s
23 timecard. This action is a form of edit and should have been considered by Dr. Schneider. When
24 I reproduced his analysis changing only the data needed to account for these excluded edits, his
25 findings are substantially altered: there were 10,359 weeks with net positive edits for department
26 managers with a mean of 2.4 hours, and there were 8,870 weeks with net negative edits, with a
27 mean of .6 hours. These findings differ substantially compared to Dr. Schneider’s original

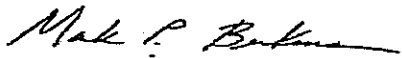
1 findings of 3,831 weeks (mean of 1.1 hours) for positive edits and 13,671 weeks (mean of 3.4
2 hours) for mean negative edits. In the words of his analysis, my revisions show that Gristede's
3 added 4.5 hours for every one hour it subtracted—that is, the 24,862 overall hours of positive
4 edits is 4.5 times as large as the 5,499 overall hours of negative edits. This finding is depicted in
5 Figure 1.

6 28. I also found several errors in Dr. Schneider's data, which are summarized in Table 5.
7 Correcting for these errors as well as including the edits he ignored, I found the average positive
8 edit for department managers was 13.9 hours, and the average negative edit was -3.9 hours, as
9 shown in Table 3. For co-managers the average positive edit was 31.7, while the average
10 negative edit was -2.5. Positive edits greatly outweigh negative edits. Overall edits added a net
11 89,000 hours for department managers. This directly contradicts Dr. Schneider's conclusion that
12 "department managers lost a significant number of compensable hours from changes to their
13 time records by Gristede's management."

14 **The Empirical Evidence Does Not Support Dr. Schneider's Conclusion That Department and Co-**
15 **Managers Were Significantly Affected by Paychecks for Less Than a Full Workweek**

16 29. In addition to leaving a false impression regarding edits to time worked, Dr. Schneider
17 also wrongly concludes that department and co-managers received a "significant" number of
18 paychecks for less than 40 or 50 hours, respectively, resulting in docked pay. Once again, Dr.
19 Schneider performs no statistical testing to support this conclusion. In fact, for department
20 managers, the fraction of paychecks for more than 40 hours is actually larger than the fraction for
21 paychecks below 40 hours. As discussed above, accounting for weeks below and above a full
22 workweek shows that employees were compensated for more than a full workweek on average
23 over the time period covered by Novatime.

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2
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4

A handwritten signature in cursive script, reading "Mark P. Berkman". The signature is written in black ink and is positioned above a horizontal line.

Mark Berkman

October 11, 2005

Oakland, California

Table 1. Days in Time Record Database and Missed Punches.

Employee	Total Days in Time Record Database												
	[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]	[10]	[11]	[12]	[13]
CHEWNING, LEWIS A	17	-	0%	17	100%	1	6%	4	24%	12	71%	0	0%
CROKER, ALFRED L	57	1	2%	56	98%	1	2%	5	9%	49	86%	1	2%
DELEON, FRANK	370	5	1%	365	99%	105	28%	56	15%	204	55%	0	0%
HELWIG, WILLIAM F	11	-	0%	11	100%	5	45%	5	45%	1	9%	0	0%
IRIZARRY, BOBBY	22	-	0%	22	100%	12	55%	10	45%	0	0%	0	0%
MORA, RUBEN D	237	1	0%	236	100%	166	70%	12	5%	57	24%	1	0%
SANTIAGO, GILBERTO	510	-	0%	510	100%	489	96%	10	2%	11	2%	0	0%
TORRES, CARLOS A	255	-	0%	255	100%	213	84%	23	9%	19	7%	0	0%
ALL OTHER CO-MANAGERS	45,313	1,106	2%	44,207	98%	14,064	31%	6,364	14%	23,452	52%	327	1%
CREMA, JOSEPH	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
DIPRETA, MARIO	285	2	1%	283	99%	2	1%	71	25%	210	74%	0	0%
MISURACA, ROBERT	863	72	8%	791	92%	5	1%	230	27%	546	63%	10	1%
PASTORINO, ROBERT	440	1	0%	439	100%	54	12%	79	18%	303	69%	3	1%
PHELPS, VICTOR	1,080	671	62%	409	38%	13	1%	23	2%	349	32%	24	2%
SALEGNA, DANIEL J	190	54	28%	136	72%	31	16%	19	10%	84	44%	2	1%
ALL OTHER DEPARTMENT MANAGERS	107,016	20,125	19%	86,891	81%	4,509	4%	14,583	14%	65,714	61%	2,085	2%

Source:

NOVAtime Database of Gristede's time records (<timeclock.sas7bdat> in Schneider backup).

Manager lists (<gristedes @LST 052405 New Class List 051905.xls> and <Mgr List Legal 8-17-04.xls> in Schneider backup).

Notes:

[1] Excludes Sundays, holidays, vacation days, and sick days. Also excludes observations where a single edit was made to account for multiple days with zero punches.

[3]=[2]/[1]

[5]=[4]/[1]

[7]=[6]/[1]

[9]=[8]/[1]

[11]=[10]/[1]

[13]=[12]/[1]

Table 2A. Number of Days with Positive or Negative Edits.

Employee	Total Days in Time Record Database	Positive Edits	%	Negative Edits	%
	[1]	[2]	[3]	[4]	[5]
CHEWNING, LEWIS A	17	8	47%	3	18%
CROKER, ALFRED L	57	11	19%	13	23%
DELEON, FRANK	370	175	47%	9	2%
HEL WIG, WILLIAM F	11	5	45%	0	0%
IRIZARRY, BOBBY	22	22	100%	0	0%
MORA, RUBEN D	237	185	78%	12	5%
SANTIAGO, GILBERTO	510	495	97%	8	2%
TORRES, CARLOS A	255	234	92%	1	0%
ALL OTHER CO-MANAGERS	45,313	20,673	46%	3,838	8%
CREMA, JOSEPH	n/a	n/a	n/a	n/a	n/a
DIPRETA, MARIO	285	57	20%	152	53%
MISURACA, ROBERT	863	225	26%	269	31%
PASTORINO, ROBERT	440	132	30%	236	54%
PHELPS, VICTOR	1,080	51	5%	94	9%
SALEGNA, DANIEL J	190	57	30%	107	56%
ALL OTHER DEPARTMENT MANAGERS	107,016	20,795	19%	37,332	35%

Source:

NOVAtime Database of Gristede's time records (<timeclock.sas7bdat> in Schneider backup).

Manager lists (<gristedes @LST 052405 New Class List 051905.xls> and <Mgr List Legal 8-17-04.xls> in Schneider backup).

Notes:

[1] Excludes Sundays, holidays, vacation days, and sick days. Also excludes observations where a single edit was made to account for multiple days with zero punches.

[2] Edits to punched hours resulting in a gain in credited hours to a day. Differences between credited hours and punched hours of less than 7.5 minutes are due to rounding and are not included.

[3]=[2]/[1]

[4] Edits to punched hours resulting in a decrease in credited hours to a day. Differences between credited hours and punched hours of less than 7.5 minutes are due to rounding and are not included.

[5]=[4]/[1]

Table 2B. Number of Weeks with Net Positive or Net Negative Edits.

Employee	Weeks in Time Record Database	Weeks with Net Positive Edits	Weeks with Net Negative		
	[6]	[7]	%	Edits	%
			[8]	[9]	[10]
CHEWNING, LEWIS A	4	2	50%	1	25%
CROKER, ALFRED L	13	8	62%	3	23%
DELEON, FRANK	133	88	66%	4	3%
HELWIG, WILLIAM F	11	5	45%	0	0%
IRIZARRY, BOBBY	6	6	100%	0	0%
MORA, RUBEN D	54	47	87%	2	4%
SANTIAGO, GILBERTO	124	119	96%	0	0%
TORRES, CARLOS A	60	56	93%	0	0%
ALL OTHER CO-MANAGERS	10,984	6,465	59%	1,136	10%
CREMA, JOSEPH	n/a	n/a	n/a	n/a	n/a
DIPRETA, MARIO	68	28	41%	19	28%
MISURACA, ROBERT	190	84	44%	34	18%
PASTORINO, ROBERT	98	39	40%	44	45%
PHELPS, VICTOR	233	45	19%	39	17%
SALEGNA, DANIEL J	37	19	51%	15	41%
ALL OTHER DEPARTMENT MANAGERS	23,401	8,799	38%	8,273	35%

Source:

NOVAtime Database of Gristede's time records (<timeclock.sas7bdat> in Schneider backup).

Manager lists (<gristedes @LST 052405 New Class List 051905.xls> and <Mgr List Legal 8-17-04.xls> in Schneider backup).

Notes:

[6] Works weeks in time record database.

[7] Weeks where the sum of edits to individual shifts was positive. Excludes Sundays.

[8]=[7]/[6]

[9] Weeks where the sum of edits to individual shifts was negative. Excludes Sundays.

[10]=[9]/[6]

Table 3. Net Effect of Edits to Time Records.

Employee	Credited Hours	Original Punched Hours	Net Hours from Edits	% Change from Original Punched Hours	Average Number of Hours per Positively Edited Week	Average Number of Hours per Negatively Edited Week
	[1]	[2]	[3]	[4]	[5]	[6]
CHEWNING, LEWIS A	158	117	41	35%	20.6	-0.3
CROKER, ALFRED L	602	519	83	16%	10.7	-0.8
DELEON, FRANK	3,107	1,632	1,475	90%	36.3	-0.3
HELWIG, WILLIAM F	52	2	50	2416%	50.0	0.0
IRIZARRY, BOBBY	220	-	220		36.7	0.0
MORA, RUBEN D	2,288	573	1,715	299%	36.5	-0.4
SANTIAGO, GILBERTO	5,087	124	4,963	4016%	46.6	0.0
TORRES, CARLOS A	2,663	277	2,386	861%	44.0	0.0
ALL OTHER CO-MANAGERS	411,434	235,172	176,262	75%	31.7	-2.5
CREMA, JOSEPH	n/a	n/a	n/a	n/a	n/a	n/a
DIPRETA, MARIO	2,102	1,844	258	14%	12.7	-5.1
MISURACA, ROBERT	6,934	5,507	1,427	26%	18.3	-3.3
PASTORINO, ROBERT	3,500	3,241	260	8%	18.1	-9.2
PHELPS, VICTOR	9,391	9,287	104	1%	5.5	-3.7
SALEGNA, DANIEL J	1,467	1,181	286	24%	17.3	-2.9
ALL OTHER DEPARTMENT MANAGERS	839,739	750,615	89,123	12%	13.9	-3.9

Source:

NOVAtime Database of Gristede's time records (<timeclock.sas7bdat> in Schneider backup).

Manager lists (<gristedes @LST 052405 New Class List 051905.xls> and <Mgr List Legal 8-17-04.xls> in Schneider backup).

Notes:

[1] Hours used in paycheck calculations.

[2] Hours based employee punches.

[3]=[1]-[2]

[4]=([1]-[2])/[2]

[5] Average net hours edited for weeks with net positive edits.

[6] Average net hours edited for weeks with net negative edits.

Table 4. Weeks in Payroll Data and Times Paid for More Than or Less Than Full Week.

Employee	Weeks in Payroll Data		Times Paid for Less than Full Week		Time Paid for Less than Full Week		As a % of Weeks for Less than Full Week		Times Paid for Greater than Full Week		As a % of Weeks for Greater than Full Week	
	Payroll Data	Full Week	Full Week	Payroll	of Work Day	Data	Week	Week	Week	Week	Data	Week
	[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]				
CHEWNING, LEWIS A	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
CROKER, ALFRED L	10	2	20%	1	10%	50%	1	10%	1	10%	1	10%
DELEON, FRANK	103	9	9%	1	1%	11%	4	4%	4	4%	4	4%
HELWIG, WILLIAM F	40	0	0%	0	0%	n/a	11	28%	11	28%	11	28%
IRIZARRY, BOBBY	5	3	60%	3	60%	100%	-	0%	-	0%	-	0%
MORA, RUBEN D	48	12	25%	3	6%	25%	2	4%	2	4%	2	4%
SANTIAGO, GILBERTO	233	8	3%	4	2%	50%	27	12%	27	12%	27	12%
TORRES, CARLOS A	65	2	3%	0	0%	0%	36	55%	36	55%	36	55%
ALL OTHER CO-MANAGERS	12,400	2,521	20%	602	5%	24%	3,207	26%	3,207	26%	3,207	26%
CREMA, JOSEPH	98	2	2%	0	0%	0%	10	10%	10	10%	10	10%
DIPRETA, MARIO	115	0	0%	0	0%	n/a	18	16%	18	16%	18	16%
MISURACA, ROBERT	229	28	12%	22	10%	79%	26	11%	26	11%	26	11%
PASTORINO, ROBERT	203	6	3%	4	2%	67%	22	11%	22	11%	22	11%
PHELPS, VICTOR	278	7	3%	2	1%	29%	32	12%	32	12%	32	12%
SALEGNA, DANIEL J	36	2	6%	0	0%	0%	19	53%	19	53%	19	53%
ALL OTHER DEPARTMENT MANAGER	29,674	1,728	6%	516	2%	30%	5,471	18%	5,471	18%	5,471	18%

Source:

Payroll Data (table "all" in "aggregate psychchecks.mdb" produced by Schneider).

Manager lists (<gristedes@LST 052405 New Class List 051905.xls> and <Mgr List Legal 8-17-04.xls> in Schneider backup).

Notes:

[1] Equal to the number of psychchecks with earnings attributable to hours worked. Excludes psychchecks that comprise Sundays, vacation, or sick days with no worked hours.

[2] Number of psychchecks for less than 50 weeks if the employee is a co-manager. Number of psychchecks for less than 40 weeks if the employee is a department manager. Excludes Sunday hours.

[3]=[2]/[1]

[4] Number of psychchecks for 10, 20, 30, or 40 hours for co-managers. Number of psychchecks for 8, 16, 24, or 32 hours for department managers. Excludes Sunday hours.

[5]=[4]/[1]

[6]=[4]/[2]

[7] Number of psychchecks for greater than 50 hours for co-managers. Number of psychchecks for greater than 40 hours for department managers. Excludes Sunday hours.

[8]=[7]/[1]

1

Table 5: Summary of Criticisms of Schneider Analysis

<i>Error</i>	<i>Effect</i>
Does not account for edits to credited hours when calculating net edits	Understates net positive edits and overstates net negative edits
Inconsistent standards applied when analyzing missed punches	Increases number of perceived missed punches

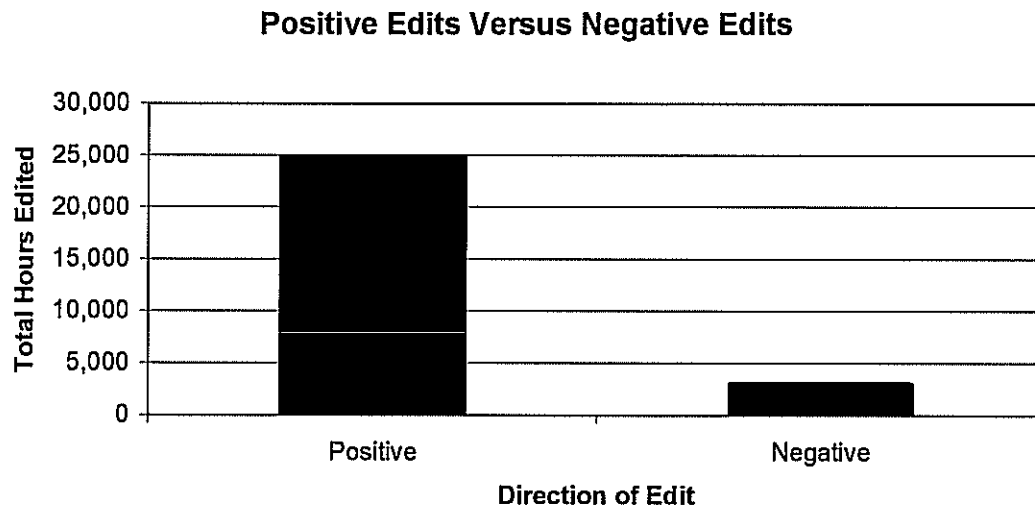


Figure 1: Positive Edits Exceed Negative Edits by a Ratio of 4.5:1

MARK P. BERKMAN—Vice President

Ph.D. Program in Public Policy Analysis, Wharton School, University Of Pennsylvania—

Graduate Group in Managerial Science and Applied Economics

M.A. Planning, Policy Analysis, and Administration Program, Harvard University

B.A. Economics and Urban Affairs, George Washington University

Dr. Mark Berkman is an expert in labor economics. He has provided counsel to clients regarding labor disputes often leading to testimony. He has studied the statistical evidence regarding claims of race, age, and gender discrimination in hiring, promotion, termination, and pay for plaintiffs and defendants in numerous industries including law enforcement, telecommunications, public transit, insurance, and banking. He has also prepared damage estimates related to these claims. Damage claims have often involved analysis and evaluation of pension benefits and stock options. Dr. Berkman has also estimated the employment impacts of proposed government regulations and plant closures.

EXPERIENCE

2002–present *Vice President*, Charles River Associates

Responsible for managing and conducting projects in labor and discrimination cases.

1983–2002 National Economic Research Associates, Inc.

Vice President, 1993–2002

Senior Consultant, 1988–1993

Senior Analyst, 1984–1988

Economic Analyst, 1983–1984

Responsible for managing and conducting projects in labor and discrimination cases as well as complex damage studies regarding antitrust, intellectual property, and environmental claims.

1980–1983 *Research Fellow*, University Of Pennsylvania

Studied the regional economic impacts of federal coal policy under a dissertation fellowship from the Regional Science Association and the Economic Development Administration. Analyzed federal coal leasing policy for the Department of Energy. Reviewed the market potential of solar energy technologies for the Energy Research Advisory Board. Conducted a commercialization study of fuel cells for the Department of Energy.

1977–1980 *Associate Budget Analyst*, Congressional Budget Office

1 Prepared cost estimates of pending energy and science legislation and developed five-
2 year projections of the federal budget in these areas. Analyzed President's budget
3 proposals and conducted energy policy studies. Testified before several Congressional
4 committees.

5 1976–1977 *Teaching Assistant*, Harvard University

6 Conducted review sessions, graded papers, and provided extra help in two courses:
7 Economics for Planners and Urban and Regional Economics.

8 1975–1976 *Research Assistant*, The Urban Institute

9 Prepared contract reports and working papers and collected and managed data on topics
10 in the fields of housing and transportation.

11 1973–1975 *Staff Assistant*, United States Congress, Office of Congressman Charles Vanik

12 Conducted legislative research and prepared position statements.

13 PROFESSIONAL ACTIVITIES

14 American Economic Association

15 Association for Public Policy Analysis and Management

16 Association of Environmental and Resource Economists

17 Western Economic Association

18 TESTIMONY AND CONSULTING REPORTS

19 Trial Testimony of Mark P. Berkman in the matter of *Barbara Niesendorf v. Levi Strauss & Company* on
20 behalf of the defendant, regarding alleged wrongful termination. San Francisco, CA, June 10, 2004.

21 Deposition Testimony of Mark P. Berkman in the matter of *Barbara Niesendorf v. Levi Strauss &*
22 *Company* on behalf of the defendant, regarding alleged wrongful termination. San Francisco, CA, April
23 29, 2004.

24 Deposition Testimony of Mark P. Berkman in the matter of *Michelle Hamamura v. Kelly-Moore Paint*
25 *Company, Inc.* on behalf of the defendant, regarding alleged gender discrimination. San Jose, CA,
26 February 12, 2004.

27 Trial Testimony of Mark P. Berkman in the matter of *Willard E. Kopetski v. Chevron Corporation et al.*,
28 Superior Court of the State of California in and for the County of San Francisco, on behalf of defendant
29 Chevron Corporation, regarding alleged wrongful termination. San Francisco, CA, January 21, 2004.

30 Expert Report in the matter of *Michelle Hamamura v. Kelly-Moore Paint Company, Inc.* in the United
31 States District Court, Northern District of California, on behalf of defendant Kelly-Moore Paint Company,
32 Inc., regarding alleged gender discrimination. January 20, 2004.

33 Trial Testimony in the matter of *National Association for the Advancement of Colored People, et al. v. The*
34 *State of Florida Department of Corrections, et al.*, In the United States District Court for the Middle District
35 of Florida, Ocala Division, on behalf of the plaintiffs. Ocala, Florida, November 12-13, 2003.

36 Expert witness report of Mark P. Berkman, Ph.D., filed in the matter of *Jeri Hewitt v. Amerigas Propane,*
37 *Inc.*, calculating damages estimates on behalf of the defendant with regard to alleged wrongful
38 termination. November 5, 2003.

1 Supplemental expert report of Mark P. Berkman filed in the matter of *National Association for the*
 2 *Advancement of Colored People, et al. v. The State of Florida Department of Corrections, et al.*, In the
 3 United States District Court for the Middle District of Florida, Ocala Division, on behalf of the plaintiffs.
 4 October 20, 2003.

5 Trial Testimony in the matter of *Daniel Millar v. San Francisco Bay Area Rapid Transit District*, Superior
 6 Court for the State of California, For the County of Alameda, on behalf of San Francisco Bay Area Rapid
 7 Transit District, regarding alleged wrongful termination. Oakland, CA, October 8-9, 2003.

8 Deposition Testimony of Mark P. Berkman in the matter of *Willard E. Kopetski v. Chevron Corporation et*
 9 *al.*, Superior Court of the State of California in and for the County of San Francisco, on behalf of
 10 defendant Chevron Corporation, regarding alleged wrongful termination. San Francisco, CA, August 18,
 11 2003.

12 Rebuttal Report of Dr. Mark P. Berkman in the matter of *Mark J. True v. Allstate Insurance Company et*
 13 *al.*, United States District Court, Eastern District of California, on behalf of the defendant. Report filed
 14 July 9, 2003.

15 Expert Witness Report of Dr. Mark P. Berkman in the matter of *Mark J. True v. Allstate Insurance*
 16 *Company et al.*, United States District Court, Eastern District of California, on behalf of the defendant,
 17 outlined proper methods for damage calculation. Report filed June 18, 2003.

18 Deposition Testimony in the matter of *Daniel Millar v. San Francisco Bay Area Rapid Transit District*,
 19 Superior Court for the State of California, For the County of Alameda, on behalf of San Francisco Bay
 20 Area Rapid Transit District, regarding alleged wrongful termination. Walnut Creek, CA, April 3, 2003.

21 Expert Witness Report in the matter of *Alpheus Ray Brokaw v. Qualcomm, Inc.*, U.S. District Court,
 22 Southern District of California, on behalf of Qualcomm, Inc. regarding alleged wrongful termination.
 23 Report filed San Diego, CA, January 23, 2003.

24 Deposition Testimony and Trial Testimony in the matter of *Lannie Staniford v. Acordia Inc., Acordia of*
 25 *California Insurance Services, Robert DeValle, James Wells, Wells Fargo and Company, and DOES 1*
 26 *through 20 inclusive*, in the Superior Court of the State of California, in and for the County of San
 27 Francisco, on behalf of defendant Acordia, Inc. regarding alleged wrongful termination. Deposition
 28 December 23, 2002; Trial Testimony January 13, 2003, both in San Francisco, CA.

29 Declaration of Mark P. Berkman before the U.S. District Court, Southern District of California, in the
 30 matter of *Durante et al. v. Qualcomm, Inc.* on behalf of Qualcomm, Inc. regarding alleged age-based
 31 termination. San Diego, CA, November 6, 2002.

32 Trial Testimony on behalf of the NAACP in the matter of *NAACP v. State of Florida Department of*
 33 *Corrections*, U.S. District Court, Middle District of Florida, Ocala Division regarding statistical evidence of
 34 race discrimination in the promotion, training and discipline of black corrections officers, Ocala, Florida,
 35 November, 2002.

36 Expert testimony on behalf of the NAACP in the matter of *NAACP v. State of Florida Department of*
 37 *Corrections*, U.S. District Court, Middle District of Florida, Ocala Division regarding the adequacy of
 38 available data for statistical analysis, Ocala, Florida, September 14, 2001.

39 Trial testimony of Mark P. Berkman in the matter of *Dawn Goodman v. City of San Jose* before the Superior
 40 Court of the State of California on behalf of the City of San Jose regarding economic damages related to
 41 alleged wrongful termination, San Jose, CA, August 16, 2001.

42 Deposition of Mark P. Berkman in the matter of *Victoria Aguinaldo Boudakian v. Avco Financial Services,*
 43 *et al.* Testimony before the United States District Court for the Eastern District of California on behalf of
 44 Avco Financial Services, regarding alleged gender-based pay discrimination, termination and related
 45 damage claims, Oakland, CA, June 19, 2001.

46 Trial Testimony of Mark P. Berkman in the matter of *Lucy Sales et al. v. County of Contra Costa et al.*,
 47 before the U.S. District Court for the Northern District of California, on behalf of Contra Costa County,
 48 regarding the utilization of minority- and women-owned firms by the County, June 18, 2001.

1 Affidavit of Mark P. Berkman in the matter of *National Association for the Advancement of Colored People,*
 2 *et al. v. State of Florida Department of Corrections, et al.*, to examine the Florida Department of
 3 Corrections data regarding the hiring and promotion of staff and analyze it for evidence of race and
 4 gender discrimination, April 4, 2001 and September 13, 2000.

5 Deposition of Mark P. Berkman in the matter of *Lucy Sales et al. v. County of Contra Costa et al.*, regarding
 6 comments on reports filed by plaintiff's experts, February 16, 2001.

7 Deposition of Mark P. Berkman in the matter of *Lucy Sales et al. v. County of Contra Costa et al.*, regarding
 8 the calculation of the utilization of minority- and women-owned firms in professional services and
 9 purchasing by the County, October 17, 2000 and July 18, 2000.

10 Amended Declaration of Mark P. Berkman in the matter of *Lucy Sales et al. v. County of Contra Costa et al.*,
 11 to calculate the utilization of minority- and woman-owned firms in professional services and purchasing by
 12 the County, September 19, 2000 and July 14, 2000.

13 "A Statistical Analysis of Coaches' Salaries at California State University, Fresno. Prepared with Michael
 14 Liu, (Confidential), March 2000.

15 "A Statistical Analysis of Fair Lending." Prepared with Anthony Yezer and Stuart Gabriel, (Confidential),
 16 January 1999.

17 "The Availability of Minority and Woman-Owned Businesses for the Southern California Regional Rail
 18 Authority." Prepared at the request of the Southern California Regional Rail Authority, December 1996.

19 Testimony before the California Public Utilities Commission, on behalf of The Joint Utilities Subcommittee,
 20 consisting of 12 California utilities, regarding NERA's study to estimate the availability of service disabled
 21 veteran-owned establishments within the geographic and product markets from which the California utilities
 22 purchase goods and services, October 17, 1996.

23 "California Disabled Veteran Business Enterprise Availability Study." Prepared for The Joint Utilities
 24 Subcommittee, consisting of 12 California utilities, October 15, 1996.

25 "An Analysis of the Utilization and Availability of Minority and Woman-Owned Businesses in the Los Angeles
 26 Metropolitan Area." Prepared with D. Evans et al., March 7, 1996.

27 "The Oregon Health Plan Economic Impact Analysis for the Employer Mandate." Prepared with J. Gaisford
 28 et al. for the Oregon Office of the Health Care Administrator, February 10, 1995.

29 "The Economic Impact of Health Care Reform in Arizona." Prepared for the Arizona Affordable Health Care
 30 Foundation, February 8, 1994.

31 "The Utilization of Minority and Women-Owned Business Enterprises by Member Agencies of the Regional
 32 Transit Association." Prepared with D. Evans et al., May 1993.

33 "The Utilization of Minority and Woman-Owned Business Enterprises by the San Francisco Redevelopment
 34 Agency." Prepared with D. Evans et al., April 1993.

35 "The Utilization of Minority and Woman-Owned Business Enterprises by the City of Hayward." Prepared
 36 with D. Evans et al., March 1993.

37 Declaration on behalf of San Francisco Bay Area Rapid Transit District in *RGW Construction, Inc. v. San*
 38 *Francisco Bay Area Rapid Transit District, et al.*, regarding evidence of discrimination against minority
 39 contractors in the Bay Area, October 8, 1992.

40 "The Utilization of Minority and Woman-Owned Business Enterprises by Alameda County." Prepared with
 41 D. Evans et al., June 1992.

42 "The Utilization of Minority and Woman-Owned Business Enterprises by Contra Costa County." Prepared
 43 with D. Evans et al., May 1992.

1 **PUBLICATIONS**

2 "Where is the Market Failure? A Review of OSHA's Economic Analysis for Its Proposed Ergonomics
3 Standard." With Jesse David. *Journal of Labor Research*, Vol. XXII, No. 1, winter, 2001.

4 "New Evidence on Racial Differences in Commuting Behavior." With J. Goodman, *Journal of Public Data*
5 *Use*, Vol. 5, No. 4, 1977.

6 **SPEECHES**

7 "The Use and Abuse of Statistics in Mortgage Lending Discrimination Cases," NERA Luncheon Seminar,
8 Chicago, Illinois, June 1996.

9 "Two Myths Exposed: Why Losses Don't Go On Forever and Why Plaintiffs Actually Should Find
10 Employment," NERA Luncheon Seminar, San Francisco, California, April 24, 1996.